

In the
Court of Appeal of the State of California
in and for the
Fifth Appellate District

UNNAMED PHYSICIAN,*

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF SAINT AGNES
MEDICAL CENTER et al.,

Defendants and Respondents.

F037760

(Super. Ct. No. 01CECG00908)

ORDER

Appellant's petition for rehearing/request for modification of opinion¹ is granted in part and denied in part as follows:

1. The third sentence of the first paragraph at page 15 of the opinion filed on November 1, 2001, is hereby modified to read "on May 17, 2001" instead of "on May 11, 2001" and the second sentence in the second paragraph at page 17 of the opinion is hereby modified to read "with the May 17, 2001, amendments" instead of "with the May 11, 2001, amendments."

2. The request to modify the opinion to include findings pursuant to California Rules of Court, rule 243.1 is denied.

* Because of the sensitive nature of the allegations made by the hospital and the pendency of the internal peer review process, we deem it necessary to protect the physician's professional reputation at this juncture and will refer to him in this opinion as an unnamed physician, or appellant.

¹ Although titled "Petition for Rehearing and Request for Modification," the petition did not seek rehearing and therefore we are treating the petition only as a request for modification.

A. The record, when filed with this court, was sealed by order of the trial court and thus this court was not required to make findings pursuant to rule 243.1. (Cal. Rules of Court, rule 12.5(c)(1).) The conditional nature of the trial court's order, sealing the record only to provide an opportunity for appellate court review of its decision not to seal the record, does not change the sealed nature of the record upon filing in this court. No other grounds for unsealing the record pursuant to rule 12.5(d)(1) have been raised.

B. Even if the July 19, 2001, order that the entire record remain sealed required express findings pursuant to rule 243.1, after considering the entire record, we would order the entire record sealed based on the following findings: There exist overriding interests that overcomes the right of the public access to the records. Without an order sealing the record, the physician in this case would be forced to make prematurely public allegations that he provided substandard medical care in an effort to force the hospital to comply with statutorily mandated procedural requirements during the *private* peer review. The legislative delegation to the private sector of professional peer review recognized the delicate balance between a physician's right to a fairly conducted peer review and the hospital's and public's interest in assuring high quality medical standards. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10; *Shacket v. Osteopathic Medical Board* (1996) 51 Cal.App.4th 223, 231.) Requiring premature publication of allegations of substandard practice in order to enforce the requirements of Business and Professions Code section 809 et seq. would prejudice the balance created and intended by the Legislature. The order sealing the entire record is narrowly tailored as it is not practical to seal only portions of the record. Essentially every document references the allegations made against the physician and we can conceive of no less restrictive means to achieve protections of the overriding interests identified.

C. Finally, even if the interests identified in paragraph B is found insufficient to justify sealing the record, we would order unsealed only that portion of the record which does not contain information identifying patients and documents received from the National Practitioner Data Bank. These documents are covered by express legislative prohibitions from disclosure (see Civ. Code, § 56 [patient identifying information], 42 U.S.C. § 11137 and 45 C.F.R. § 60.13 [documents filed with the National Practitioner Data Bank]) and thus there exist overriding interests that overcome the right of the public access to the records. The overriding interests support sealing of those records which include the names and other identifying information of patients, and those documents in the record received from the National Practitioner Data Bank, in order to avoid the substantial probability of prejudice to these interests.

This modification does not affect a change in the judgment.

Ardaiz, P. J.

I CONCUR:

Wiseman, J.